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Nos. 7, 14

In the Supreme Court of the United States

OCTOBER TERM, 1938

ROLLA W. COLEMAN, W. A. HARBON, CLAUDE C. BRADNEY, ET AL., PETITIONERS

v.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE OF THE STATE OF KANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., PETITIONERS

v.

JAMES W. WISE AND RAY B. MOSS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AMICUS CURIAE

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This memorandum will be confined to two questions: (1) the jurisdiction of this Court, discussed

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in our original brief at pages 33–44; and (2) the right of the Lieutenant Governor of Kansas to cast a deciding vote in the State Senate, a question not discussed in our original brief.

I

In the Kansas case (No. 7) it is submitted that the petitioners have no standing to challenge the right of the State to ratify the proposed Amendment and have its vote recorded with the Secretary of State of the United States. The petitioners in that case lack the personal interest which is a prerequisite to an attack in a Federal court on the legislative or other official acts of a State. See our original brief, page 36, and cases there cited. The Kansas case is a particularly appropriate one for the application of this principle, since the petitioners are seeking relief which would fetter the amending process as the State conceives it, and which is unnecessary to the safeguarding of any right or privilege. If the decision of the Kansas court is allowed to stand, and the resolution of ratification is accordingly enrolled and notice is sent to the Secretary of State, the Federal questions now sought to be raised will not be foreclosed. Insofar as these questions are justiciable at all, they can be presented for decision when and if their solution becomes germane to some actual controversy. It is wholly conjectural to assume at the present time that such a controversy will arise. Possibly the Amendment will not be ratified by 36 States; or, if

so ratified, the action of Kansas may not be decisive with respect to the adoption of the Amendment; or, if the question does become decisive, the contention that there was no power in the State to ratify, or that the ratifying body was not the legislature, may be presented and decided in a proper case, with review in this court. The Kansas case thus appears as an effort to anticipate important issues of constitutional law, at the instance of parties whose own necessities do not call for a decision.[1]

With respect to the question of the power of the Lieutenant Governor, the problem of jurisdiction is probably to be viewed somewhat differently, though with the same result. If the resolution is enrolled and notice sent to the Secretary of State, the opportunity of members of the legislature to question the regularity of the vote will probably have been lost, insofar as the matter is one of state law and practice. *Cf. Leser* v. *Garnett,* 258 U. S.

[1] The suggestion was made in our original brief (p. 44) that jurisdiction in the Kansas case might possibly be rested on the fact that at least two of the petitioners appear to have been members of the legislature in 1925, when the vote of rejection occurred, and to have voted for rejection, and that hence their present petition may be viewed as an attempt to vindicate their prior vote as against what is asserted to be an illegitimate countervailing vote in 1937. Aside from the question whether these facts would present a case of threatened infringement of rights warranting intervention by this Court, the facts are not disclosed or relied on in the record, and hence a Federal claim based thereon has probably not been asserted in the State court with sufficient definiteness and clarity to furnish a basis for review here.

130, 137. To the extent that it is a state question, there is, of course, no ground for review in this Court in any event. And insofar as the matter may present a Federal question, turning on the meaning of the term "legislature" in Article V, it will be no more foreclosed than any other Federal question sought to be raised in the case.

The Kentucky case (No. 14), it is submitted, stands on an entirely different footing. As we endeavored to point out in our original brief (pages 35–43), the Governor, petitioner here, is seeking to exercise an authority under the Constitution and laws of the United States; the respondents have sought to interfere with the exercise of that authority by preventing official notice of the action of Kentucky from reaching the Secretary of State—an interference which would have important legal as well as practical consequences; and the relief actually granted constitutes just as effective an interference, clouding if not wholly nullifying the notice theretofore received by the Secretary of State from the Governor.[2] We shall not repeat

2. In insisting on the interest of petitioners in having the notice of ratification free from interference, our position is not inconsistent with our contention that the petitioners in the Kansas case have no interest in preventing the notice from being sent. In the Kentucky case the petitioners are entitled, in carrying out a Federal function, to protection against any impairment of the exercise of that function. In the Kansas case the petitioners' only possible interest is in vindicating the prior vote of rejection or in exscinding the vote of the Lieutenant Governor, and neither of these interests, insofar as they present Federal questions, would be prejudiced by the notice of ratification.

here the discussion of these points contained in our original brief.

The substantial question in the Kentucky case, it is believed, is not the jurisdiction of this Court to review the action of the State court, but is rather the scope of that review—whether the judgment below should be reversed because it constitutes an unwarranted interference with an officer acting at the very least under color of federal authority, or whether the judgment should be reversed only if the Court, upon consideration of the substantive federal questions, concludes that the defendants were engaged in a valid exercise of the power of ratification. Either of these alternatives would appear to be tenable.

With respect to the first alternative, under which it would be unnecessary to consider the validity of the resolution of ratification, it is to be emphasized that the present case is one of the control by a state court over defendants who claim to be performing federal functions, where no private rights are being threatened or infringed, and where, consequently, a federal court would be powerless to act for want of an actual controversy. It is questionable whether the autonomy of state courts in respect of their own procedure and jurisdiction extends thus far. At an early date it was insisted that since the use and scope of the writ of mandamus in a state court was a matter properly within the authority of that court, the writ could issue against a federal officer to compel the discharge of his duties; but the

argument did not prevail with this Court, which pointed out that not even the inferior federal courts had been vested with such control over federal officers, and that in this class of cases the autonomy of the state courts must yield. *McClung* v. *Silliman*, 6 Wheat. 598. So in the present case there is ground for concluding that where no private rights require the protection of a court, the State courts are not vested with authority beyond that of the federal courts to control the performance of federal functions. Doubtless Congress could expressly have so provided. Compare *In re Neagle*, 135 U. S. 1. The conclusion would be clearer if Congress had spoken, or in the absence of Congressional legislation, if the acts of the defendants were unquestionably done in the performance of valid federal functions and not, as here, challenged as spurious. In view of these latter considerations it would perhaps be the more appropriate course for this Court to set aside the action of the state court only if the challenged act of ratification is found to be a proper exercise of the amending power.

That the validity of the ratification should be considered by the Court is indicated by the decisions in *Hawke* v. *Smith, No. 1*, ~~235~~ 253 U. S. 221, and *Hawke* v. *Smith, No. 2*, 253 U. S. 231. In those cases the plaintiff, plaintiff in error in this Court, sought to enjoin the Secretary of State of Ohio from spending the public money in preparing and printing forms of ballot for submission of a refer-

endum on the question of the ratification which the legislature had theretofore made of the proposed Eighteenth and Nineteenth Amendments, respectively. In those cases the plaintiff established a pecuniary interest, albeit a slender one, in the prevention of the threatened action of the defendant, and the cases are therefore not strictly apposite here. Nevertheless, the Court in those cases might have decided that the interest of the plaintiff did not justify interference with the action of the Secretary of State under color of federal authority. The Court in fact passed on the merits of the plaintiff's contention that the referendum was an improper procedure for constitutional amendment, decided the issue in plaintiff's favor, and reversed and remanded the cause to the state court for further proceedings.

In the case at bar we think that a similar course is proper. The problem is one of adjusting the authority and independence of the state courts, on the one hand, and the protection of federal authority, on the other. This adjustment can fittingly be made by reviewing in this Court the merits of the conflicting contentions as to the validity of the act of ratification. If, as we contend, the ratification was valid, the interference with the federal function can be removed by reversal of the judgment. If, on the other hand, the ratification was invalid, there has been no genuine interference with the performance of a federal function.

II

If our argument that there is no jurisdiction to review the judgment in the Kansas case is sound, it is unnecessary to discuss the question of the authority of the Lieutenant Governor of Kansas to vote on the ratifying resolution. If, however, our argument on the issue of jurisdiction is not accepted, the following considerations are advanced in support of the view that the Lieutenant Governor did have authority to vote.

That he had authority as a matter of state law and practice has been settled by the decision of the Kansas court. The only Federal question is whether, as his vote was decisive in the Kansas Senate, the ratification was had by the "legislature" of the State within the meaning of Article V of the Federal Constitution. The term "legislature" as used in the Constitution means what it meant when the Constitution was adopted, and at that time a legislature was "the representative body which made the laws of the people." *Hawke* v. *Smith, No. 1,* 253 U. S. 221, 227; *Smiley* v. *Holm,* 285 U. S. 355, 365. At the time of the adoption of the Constitution the authority of a lieutenant governor to cast a deciding vote in the state senate was a familiar practice, and, indeed, the office of lieutenant governor furnished the model for the Vice Presidency. See Federalist, No. 68 (Hamilton); Luce, *Legislative Procedure,* pp. 445–464.

The authority of the Lieutenant Governor to participate in the vote of the Senate is thus not an innovation or a practice which might impair the constitutional concept of a legislature. The Lieutenant Governor, while not an "elected member" of the legislature within the meaning of the Kansas Constitution, is nevertheless a participant in the functions of the State Senate, quite apart from the function of ratification of constitutional amendments. In Kansas the Lieutenant Governor is not only the presiding officer of the Senate, but he appoints the standing committees, to which bills must be referred. Senate Rules, No. 21.

Apparently there would be no question of the right of the Lieutenant Governor to be considered part of the legislative body if his power to vote extended to the passage of bills and joint resolutions, that is, to positive lawmaking. The argument seems to be that since his right to vote is limited to the passage of concurrent resolutions, which are not used for positive lawmaking, he is not part of the body which "makes the laws." This argument, it is submitted, is fallacious, for it misconceives the nature of the ratifying function. Ratification of a proposed amendment is not a legislative function in the strict sense; if it were, the approval of the Governor would be required and in Kansas it could be carried out only by bill or joint resolution. For the same reason a referendum cannot be used to

express assent to a proposed amendment, though it can be used as part of the legislative process in relation to the redistricting of a state under Article I, Section 4, of the Constitution. *Hawke* v. *Smith, supra,* at 230–231. Precisely because ratification is not an act of lawmaking, the internal procedure appropriate for positive lawmaking by the legislature cannot be regarded as binding. Similarly, when state legislatures elected Senators under Article I, Section 3, of the Constitution, they did not act to make laws, and they were authorized by Congress itself to act in joint assembly where the separate houses failed to act or failed to choose the same person. R. S. Section 14.

These are matters of internal procedure. So long as the procedure is appropriate to the function, it cannot be said to be forbidden by the Federal Constitution. The use of a concurrent resolution, which carries with it the power of the Lieutenant Governor to cast a deciding vote, is the most appropriate procedure which could be employed for the passage of a ratifying resolution, which does not require the approval of the Governor, and hence there is no basis for concluding that because this procedure was employed the ratifying body ceased to be the legislature of the State.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

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